State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Rochester Police Commission Complainant v. International Brotherhood of Police Officers, Local 580 (Rochester) Respondent	Case No. P-0749-25
International Brotherhood of Police Officers, Local 580 (Rochester) Complainant v. Rochester Police Commission Respondent	Case No. P-0749-26 Decision No. 2002-066

APPEARANCES

Representing Rochester Police Commission:

Daniel P. Schwarz, Esq., Counsel

Representing IBPO, Local 580 (Rochester):

Peter C. Phillips, Esq., Counsel

Also appearing:

David G. Dubois, Rochester Police Commission

BACKGROUND

The Rochester Police Commission ("Commission") filed unfair labor practice (ULP) charges on January 7, 2002 against the International Brotherhood of Police Officers Local 580 (Union) alleging a violation of RSA 273-A:5 II (f) relating to a breach of contract which occurred when the Union sought to

arbitrate the reassignment of two grievants, allegedly a matter which the collective bargaining agreement (CBA) "commits...to the sole discretion of the Commission." The Union filed its responsive pleadings to these charges on January 22, 2002.

The Union filed unfair labor practice charges on February 8, 2002 against the Commission alleging violations of RSA 273-A:5 I (a), (e), (g) and (h) resulting from the Commission's failing and refusing to comply with a final and binding arbitration award dated August 11, 2001 and from the Commission's seeking to have that award vacated and/or modified. The Commission filed its responsive pleadings to these charges on February 25, 2002.

The two ULP complaints were consolidated for a pre-hearing conference which was held on February 25, 2002, as memorialized by Decision No. 2002-029 dated February 27, 2002. During the pre-hearing conference, counsel for both parties agreed that the two ULP's could be consolidated for consideration by the PELRB. This matter was then set for hearing before the PELRB on April 18, 2002. At that hearing, counsel stated that they had agreed on a stipulated set of facts, that an evidentiary hearing would not be required and that they agreed to submit post-hearing briefs by May 20, 2002. Both briefs were timely filed.

FINDINGS OF FACT

1. The City of Rochester Police Commission, by virtue of its operation and control of the Rochester Police Department, is a "public employer" within the meaning of RSA 273-A:1 X.

2. The International Brotherhood of Police Officers, Local 580 is the duly certified bargaining agent for full-time police officers through the rank of sergeant employed by the Rochester Police Department.

3. The Commission and the Union are presently parties to a CBA for the period July 5, 2000 to June 30, 2003. The prior CBA was effective for the period July 1, 1999 to June 30, 2000. (There is no explanation relating to the four day gap between the two contracts.) Item E (5) of contract Article V, entitled "Dispute Procedure," as found in the older of the two CBA's reads:

> The arbitrator shall limit himself/herself to the issues submitted to him/her and shall consider nothing else. He/She may add nothing to nor subtract anything from the Agreement between the Parties. The findings and decision of the arbitrator shall be final and binding on the Union, the Aggrieved and the Commission.

Item E (5) of Article V of the 2000-2003 CBA contains exactly the same language plus an additional sentence which reads:

> However, any party may appeal the arbitrator's decision to the Superior Court in accordance with the provisions of RSA 542.

Article XXVIII of the 2000-2003 CBA provides:

> The provisions of this Agreement will be effective as of July 5, 2000, supplementing and superseding the prior wages, hours and other economic benefits, except as otherwise herein provided, and will continue and remain in full force and effect until June 30, 2003...

4. The parties' Joint Stipulation of Facts, submitted to the PELRB in furtherance of their agreement announced on April 18, 2002, is as follows:

1. The City of Rochester Board of Police Commissioners (the "Commission") and the International Brotherhood of Police Officers, Local 580 (the "Union"), were parties to a collective bargaining agreement ("CBA") with effective dates July 1, 1999 through June 30, 2000. (See Joint Exhibit [JX] –1). The CBA governed the working conditions for certain employees of the Department, specifically police officers and detectives.

2. On March 20, 2000, Captain Dubois ordered officers Timothy Brown and Thomas Blair to disclose the source of a rumor that they had pertaining to Police Commissioner Paul Dumont; a rumor that Brown had shared with Captain Donlan.

3. The order to disclose the source of the rumor arose out of Captain Dubois' investigation of a complaint that Officers Blair and Brown had acted improperly in the interrogation of an arson suspect at the Strafford County Jail (the "Ragas Investigation"). In the course of Ragas Investigation, Captain Dubois learned that Blair and Brown had reported a rumor that one of the Police Commissioners, Paul Dumont, who is also a Strafford County Commissioner, was "out to get them."

4. On March 21, 2000, Officers Brown and Blair refused to disclose the source of the rumor. In response, Captain Dubois recommended a five-day suspension for insubordination in violation of Rules Chapter IV, and SOP 45 (the "Insubordination Issue"). (See JX-2A, JX-2B).

5. As a result of alleged misconduct by Officers Brown and Blair during the Ragas Interrogation, Captain Dubois recommended that Blair and Brown serve an additional 5-day unpaid suspension. He also recommended, in what he viewed as a personnel decision, that the two should be removed from the Detective Bureau and reassigned to the Patrol Division ("Reassignment Issue"). (See JX-3A, JX-3B).

6. The Chief of Police accepted the recommendations of Captain Dubois, and in March/April 2000, Officers Blair and Brown filed written grievances regarding the actions of the Department to the Commission, (See JX-4).

7. Meanwhile, the Commission and the Union were in the process of negotiating a successor CBA. During the course of negotiations, the Commission proposed that Article Five (Dispute Procedure) be amended by adding that "....any party may appeal the arbitrator's decision to the Superior Court in accordance with RSA 542." The 1999-2000 CBA contains so such reference.

8. After the 1999-2000 CBA had expired, and while the Blair/Brown grievances were still pending before the Commission, the Commission and the Union reached a *tentative* agreement on a successor CBA (for the period 2000-2003) which contained the new RSA 542 provision. There was no specific discussion between the parties as to whether or not the RSA 542 provision would apply to the already pending Brown/Blair grievances. (The successor CBA was subsequently ratified by the Union and the Rochester City Council, and signed and executed by the parties on September 14, 2000, with an effective date of July 5, 2000.) (See JX-5).

9. On or about July 30, 2000, the Commission (a) upheld the 5-day suspensions on the Insubordination Issue; (b) upheld the reassignment of Officers Brown and Blair from the Detective Division to the Patrol Division, (c) reduced the 5-day suspension arising out of the officers' conduct in the Ragas Interrogation to a written warning, and (d) ordered the Police Department to reimburse Officers Brown and Blair for 5 days of wages. (See JX-6).

10. On August 15, 2000, the Union requested arbitration on behalf of Officers Blair and Brown regarding the 5-day suspensions and written warnings issued to them as the result of the Ragas Investigation.

11. On September 15, 2000, the Union filed an Unfair Labor Practice ("ULP") charge against the Commission with the Public Employee Labor Relations Board. The charge alleged that Captain Dubois had violated the officer's Weingarten Rights in the course of the Ragas Investigation.

12. On or about October 30, 2000, the Union filed an amended ULP charge wherein it challenged the Commission's decision regarding the removal of Officers Blair and Brown

from the Investigative Services Bureau and sought their reinstatement to the bureau. (See JX-7)

13. On or about November 11, 2000, the Commission filed objections to Union's amended charge and moved to dismiss, arguing that there had been no Weingarten violation and that reassignment of personnel was, in accordance with the CBA, committed to the sole discretion of the Commission. (See JX-8).

14. On December 18, 2000, the Union and the Commission reached an agreement whereby the ULP would be withdrawn and the issues raised and relief sought by the Union therein "may be asserted before the Arbitrator." (See JX-9)

15. On March 9, 2001, at the outset of the arbitration hearing, the parties settled the grievance with regard to the written warning issued to the two officers. Moreover, the parties agreed to submit the following issues to be decided by the arbitrator:

    (a) Whether the Rochester Police Commission acted in accordance with the contract between the Commission and IBPO Local 580 when it imposed a five (5) day suspension without pay against Thomas Blair and Timothy Brown for insubordination?

        If not, what shall be the remedy?

    (b) Whether or not the decision of the Chief of the Police Department to remove Thomas Blair and Timothy Brown from the Investigation Services Bureau to the Patrol Services Bureau is arbitrable?

16. The parties submitted the 1999-2000 CBA to the arbitrator as Joint Exhibit 1 for her review and consideration. The 2000-2003 CBA was not entered as an exhibit.

17. In her award dated August 11, 2001, the Arbitrator (a) sustained the Union's grievance on the 5-day suspensions and ordered that Officers Blair and Brown be made whole for any loss of pay; (b) ruled that Captain Dubois had not violated the officers' Weingarten Rights; and (c) ruled that the matter of the reassignments was arbitrable. (See JX-10).

18. The Union has sought arbitration on the merits of the reassignment issue and the Commission has refused, arguing

that the matter is not arbitrable, and that only the PELRB (and not the Arbitrator herself) can determine arbitrability.

19. On or about September 11, 2001, the Commission filed a "Petition in Equity" in Strafford County Superior Court to vacate and/or remand the arbitrator's award pursuant to RSA 542. (See JX-11).

Respectfully submitted,

On behalf of the Rochester Police Commission:	On behalf of IBPO Local 580:
/s/ Daniel P. Schwarz	*/s/ Peter C. Phillips*
Daniel P. Schwarz, Esq.	Peter C. Phillips, Esq. 4-16-02

DECISION AND ORDER

When discipline was first recommended and imposed on Officers Blair and Brown in March and April of 2000 (Findings 5 and 6, above, and Joint Ex. Nos. 3A, 3B and 4), the parties were operating under their 1999-2000 CBA. By March 27, 2000, both officers had communicated with Chief Auger that "pursuant to the Union contract between the City and the...International...I am requesting an appeal of this action." By April 3, 2000, both officers had further communicated with the chief to "please accept this letter as my intent to appeal to the City of Rochester Police Commission Disciplinary Action and Administrative Action taken on April 3, 2000." (Joint Ex. No. 4.) This suggests that the dispute procedure in Article V of the CBA was initiated not later than April 3, 2000. This is cause for us to examine the provisions of the 1999-2000 CBA.

The 1999-2000 CBA, the CBA which was presented to the arbitrator as a basis upon which the parties sought their respective cases to be determined (Joint Stipulation No. 16, p. 5, above), contained a management rights clause, denominated Article VIII, "Commission Rights." It provided, *inter alia*, the right for the Commission, through the Police Department "to direct the working forces,...to assign and transfer employees...to suspend, discipline or discharge employees for just cause...All rights which ordinarily rest in and are exercised by public employers, except as such are specifically relinquished herein, are reserved to and remain vested in the Commission." Article V of that same document was the "Dispute Procedure" with a dispute being defined as "meaning [a] grievance or disagreement arising out of the application or interpretation of the provisions of the Agreement." The issue stipulated by the parties for consideration by the arbitrator was "whether the...Commission acted in accordance with the contract...when it imposed a 5 day suspension" on the two officers for insubordination. (Joint Stipulation No. 15, p. 5, above.)

Both the arbitrator's summary of the evidence (Joint Ex. No. 10, p. 2) and the award itself (Joint Ex. No. 10, p. 15) spoke to the issue of whether the 5 day suspension for insubordination was supported by just cause. Thus, the issue is joined: the CBA provides a just cause standard for discipline and the grievants have challenged the application of that standard vis-à-vis the discipline which was imposed on

them. We are both satisfied and convinced that the scope of the arbitration proceedings were within that which was contemplated in the contract. The fact that the parties stipulated the arbitration issue involving insubordination the way they did (Joint Stipulation No. 15 (a), p. 5 above and Joint Ex. No. 10, p. 10) only serves to confirm that they received the benefit of their bargain when they arbitrated that issue. What is lacking in this case is the benefit of the bargain as it applies to the final and binding nature of those proceedings, as agreed to by the parties. (Finding No. 3, above.)

We are mindful that there is an issue pending involving the language which was added to Item E (5) of Article V of the 2000-2003 CBA. We are also mindful that the City/Commission filed a petition in equity on or about September 11, 2001 to "vacate or remand" the arbitrator's decision of August 11, 2001. (Joint Ex. No. 11.) On or about December 4, 2001, the Union filed an answer to that petition followed by a motion to dismiss on January 14, 2002. (Joint Ex. No. 11.) From the documents the parties submitted as part of Joint Ex. No. 11, it appears that a hearing has been held on the Union's motion to dismiss and that it was denied on or about March 12, 2002. (Strafford County, Docket 01-E-165.) We are troubled by what appears to be the triggering event or date referenced in that decision, keeping in mind that the parties negotiated that the RSA 542 provisions added to CBA Article V, Item E (5) would, along with the rest of the contract (i.e., there was no reservation or separate date negotiated as the effective date of changes to Article V), become effective July 5, 2000. (See also Finding No. 3, above.)

In essence, the Superior Court's order in Strafford Docket 01-E-165 acknowledged the positions of the parties, namely, that the Union moved for dismissal because the CBA in effect at the time the misconduct occurred did not contain a RSA 542 review provision and that the Commission argued against dismissal because the CBA in effect when the arbitration proceedings began did contain such a provision. Under the contract and under the public policy reasons which formed the foundation causing RSA 273-A:4 to require "workable grievance procedures," we believe that neither event, be it the misconduct or the commencement of arbitration proceedings, was the proper or appropriate triggering event.

The event which should determine whether an employee pursuing a dispute under Article V is governed by the 1999-2000 or the 2000-2003 CBA is neither the alleged employee misconduct nor the commencement of arbitration; it is the date *discipline* was first imposed. This, then, becomes the date from which the aggrieved knows about the type of and ramifications from the discipline which has been imposed and from which the aggrieved has a given number of days in which to file an objection or appeal with the chief or the Commission, as the case may be. This is the date from which rights flow or expire; it is the controlling date. Article V, Section C specifically provides, "Failure at any step of this procedure to appeal a dispute to the next step within the specified time limits shall be deemed to be acceptance of the decision rendered at that step. If the Department does not answer in writing, within the time periods provided, the grievance shall be considered resolved in the employee's and/or the Union's favor." [1] Thus, the proverbial "clock" starts running when the right to grieve or appeal attaches, not when the decision to seek arbitration is made.

Public policy considerations also weigh in favor of the date of imposition of discipline as the controlling date. As was the case here, had the progress through Steps 1, 2 and 3 of Article V, Section C been limited to one event or one day, each, presumably there would have been time (i.e., the Union would have had knowledge that it wanted to appeal to arbitration) to invoke arbitration before the negotiated July 5, 2000 effective date. But, we know from Joint Ex. No. 6 dated July 20, 2000, that the Commission

[1] We note that counsel for the Commission, in his objection to amended unfair labor practice charges dated November 11, 2000, (Joint Ex. No. 8, pp 1 and 2) has used the date of April 3, 2000 as the operative date when the officers' transfer back to the Patrol Bureau was "executed by the Chief." It is an extreme example of pleading in the alternative, to say the least, for the Commission to be relying on an April 3, 2000 operative date in making an argument relating to the statute of limitations and, simultaneously, to be relying on a date of August 7, 2000, when the Union requested arbitration, as controlling for purpose of accessing a RSA 542 review. (See Joint Ex. No. 11, "Plaintiff's Objection to the Defendant's Motion to Dismiss," dated February 14, 2002.)

process involved "three days of due process hearings." Whether international or not, the length of proceedings used by either side should not have a due process impact on the rights of the other. Likewise, neither side should be forced to surrender or abbreviate due process rights in order to avoid coming under newly negotiated contract provisions negotiated after the discipline was imposed. In this case, management had the prerogative of when, how and what discipline to impose and then, with binding arbitration invoked under Article V, returned to the new CBA to find a way to overturn an arbitral result it did not like. The controlling date must be one controlled by neither side. Management has the option of when, if and how to discipline. Once having done so, it must be ready to defend that decision according to the provisions in place when the discipline was administered. Within the confines of these proceedings, this is the only process which meets the requirement of "workable grievance procedures" under RSA 273-A:4 and also addresses the fostering of "harmonious and cooperative relations" as contemplated by Chapter 490:1 of the Laws of 1975.

Our last area of concern is whether there was an agreement to arbitrate and, if so, what was it? From our earlier analysis this may be readily answered affirmatively for the insubordination changes. The imposition of discipline contractually invoked just cause standards, just cause was part of the contract, its interpretation or application falls under the definition in Article V, and, thus, the subject is arbitrable. This conclusion becomes, essentially, uncontrovertible when the history of these proceedings and the parties' stipulations. (Finding No. 5, above, and Joint Ex. No. 10, p. 1) are examined.

On or about September 15, 2000, the Union, in separate proceedings, filed ULP charges against the Commission for violating *Weingarten* [42 U.S. 251, (1975)] rights which should have been accorded to Blair and Brown in the course of the very investigation which caused their 5 day suspensions for insubordination in these cases. The September 15, 2000 ULP was thereafter settled by the parties appearing before the PELRB on or about December 18, 2000 (Joint Ex. No. 9). This settlement involved the Union's satisfaction and withdrawal of the *Weingarten* complaint, so-called, with prejudice (Joint Ex. No. 9 and PELRB Decision 2000-126 dated December 19, 2000) in exchange for the Commission's promise to provide officers access to *Weingarten* rights and it was "agreed that the issues raised and relief sought by the Union in this matter may be asserted before the Arbitrator in pending PELRB Case No. P-0749-20." (Joint Ex. No. 9)

The arbitration request in Case No. P-0749-20 was filed by the Union (i.e., received by PELRB) on August 8, 2000, versus August 15, 2000 stipulated by the parties in Finding No. 4, Item 10 appearing on page 4 above. Arbitrator Sharon Ellis was appointed as arbitrator in Case No. P-0749-20 on October 2, 2000 and subsequently heard the case and wrote the decision now found as Joint Ex. No. 10. The parties not only had an agreement to arbitrate; they also has engaged in *quid pro quo* negotiations to cause the dismissal of a pending ULP in exchange for an agreement about what the Union could raise in the arbitration proceedings. The Union was induced to withdraw the pending ULP in Case No. P-0749:21 in exchange for the Commission's promise, by way of Joint Ex. No. 9, that the pending Blair and Brown matters could be resolved by a neutral arbitrator without procedural interference from the public employer.

At this point, we have tied what appears to be the parties' agreement or arrangement to arbitrate (1) to contract language covering the subject matter of the insubordination grievance vis-à-vis the just cause standards contained in the CBA, (2) to the parties' stipulations before the arbitrator, appearing in Joint Ex. No. 10, and at Finding No. 4-15 appearing on page 5, above, and (3) to a *quid pro quo* settlement agreement found at Joint Ex. No. 9. When we measure these considerations against the requirement that there must be "positive assurance" that the parties did *not* have an agreement to arbitrate before the process will be blocked, we must find in favor of the presumption of arbitrability.

As Justice Batchelder wrote in Appeal of Westmoreland School Bd., 132 N.H. 113 at 109 (1989), "The real issue here, however, is whether the contracting parties' have agreed to arbitrate a particular dispute." Each of the three foregoing indicia points conclusively to such an agreement, notwithstanding that the "positive assurance test" requires its proponent to prove a negative. "Under the 'positive assurance' standard, when a CBA contains an arbitration clause, a presumption of arbitrability exists and 'in the absences of any express provision excluding a particular grievance from arbitration,...only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" Westmoreland, 132 N.H. 103, 106 (1989) quoting from Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 584 (1960). Less than a year later in Appeal of City of Nashua, 132 N.H. 699 at 701 (1990), Justice Batchelder reaffirmed the Court's policy that "we will not reverse an order to arbitrate unless we can say with positive assurance that the CBA's arbitration clause is not susceptible of a reading that will cover the dispute." In this case, the arbitration clause, as well as the parties' agreement to arbitrate, points us to the conclusion, that there is no such positive assurance and that the parties' writings and conduct both strongly point to an intent to arbitrate.

It is well settled that "grievance language specifically negotiated and agreed upon is binding on both the public employee and the public employer." Appeal of Hooksett School Dist., 126 N.H. 202, 204 (1985) and Appeal of Berlin Board of Educ., 120 N.H. 226, 230 (1980). When the parties dispute the interpretation and application of a contract provision, as was the case here with the imposition of discipline, they are "required to follow the agreed upon grievance procedure." Appeal of State of New Hampshire, Docket No. 98-761, Slip. op. February 1, 2001. Implicit in this requirement is not only the parties' participation in the agreed-upon process but also compliance with the agreed upon nature of the arbitrator's award, namely its final and binding nature as referenced in Finding No. 3, above. "When parties agree in a CBA to be bound by arbitration awards, the failure to comply with an arbitrator's award may constitute an unfair labor practice," Appeal of State of New Hampshire, Docket No. 99-419, Slip. op. October 23, 2001, citing to Appeal of Belknap County Commrs., 146 N.H. 757 (2001).

For the reasons stated, the Commission has violated the CBA and has committed an unfair labor practice in violation of RSA 273-A:5 I (e), (g) and (h) by failing to implement the arbitrator's final and binding award in the insubordination discipline case. It shall do so forthwith.

There was a second issue stipulated by the parties to the arbitrator and as appears as Item 15 (b) of Finding No. 4, above, namely an issue of arbitrability on the matter of removing Blair and Brown from the Investigative Bureau and reassigning them to the Patrol Bureau. The record, by virtue of the stipulation here and before the arbitrator and the *quid pro quo* negotiations to resolve and withdraw Case No. P-0749-21, supports the notion that the parties agreed to arbitrate the issue of arbitrability. These certainly is no "positive assurance" that they did not so agree. Likewise, the nature of the transfer, namely its timing and its being a consequence of adverse actions perceived by management, gives every outward appearance that it was implemented as a disciplinary measure, rather than a managerial prerogative motivated by non-disciplinary purposes.

As was the case in Appeal of State of New Hampshire, Docket No. 99-419, above, the parties in that case, as in this case, agreed in the issue stipulated to the arbitrator that the arbitrator may decide matters of arbitrability. Having done so, the parties have obligated themselves to follow through with that process. It is implicit in New Hampshire law that "there is implied in every contract an obligation of good faith and fair dealing." Appeal of State, *supra*, quoting Bursey v. Clement, 118 N.H. 412, 414 (1978). Reneging on an agreement to arbitrate is inconsistent with this duty of fair dealing and amounts to a ULP in violation of RSA 273-A:5 I (e) and (g) as the latter applies to obligations found in RSA 273-A:3 to bargain in good faith.

By attempting to appeal the arbitrator's ruling on arbitrability at this time (also part of Joint Ex. No. 10 and denominated under Joint Ex. No. 9 as being part of the Case No. P-0749:20 *quid pro quo* negotiations) the Commission is seeking to have the arbitrability award modified or vacated. This is inconsistent with their promise to arbitrate, as evidenced both by stipulations and the settlement/withdrawal components of Joint Ex. No. 9. The Commission's duty presently is to proceed with the arbitration on the merits, in accordance with the arbitrator's award. This matter will not be ripe for further review, whether by this board or under RSA 542, if its provisions should be applicable, until the Commission has "lost" the reassignment case on the merits. The Commission's actions currently leave the issue in limbo and their promise to arbitrate unfulfilled.

The Commission's actions relating to the arbitrability grievance, as described above, constitute a ULP in violation of RSA 273-A:5 I (e) and (g). The Commission shall CEASE and DESIST from these activities and shall comply with the arbitrator's award by proposing an "acceptable date for presenting evidence on the issue of the just cause of the reassignments" forthwith.

So ordered.

Signed this 26th day of June, 2002.

JACK BUCKLEY
Chairman

By unanimous vote. Chairman Jack Buckley presiding. Members E. Vincent Hall and Carol Granfield present and voting.